UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 27

ROSEBUD HEALTHCARE CENTER

Employer/Petitioner

Case No. 27-UC-227

and

MONTANA NURSES ASSOCIATION, LOCAL 38

Union

DECISION AND ORDER DISMISSING PETITION

Since April 2005, Montana Nurses Association, Local 38 (herein called "the Union") has been the certified collective-bargaining representative for a unit consisting of the Rosebud Healthcare Center's hospital and nursing home Registered Nurses (RNs). There are approximately 12 employees in the bargaining unit.

On June 5, 2008, Rosebud Healthcare Center, herein called "the Employer," filed a unit clarification petition under Section 9(b) of the National Labor Relations Act, as amended, seeking to exclude all RNs from the unit. On July 9, 2008, the Employer filed an amended petition, indicating that it sought to exclude from the unit all the hospital and nursing home RNs. Given that the unit consists only of the hospital and nursing home RNs, the Employer's petition seeks elimination of the unit. On July 16 and 17, 2008, a hearing officer held a hearing on the petition.

The parties agree that an issue to be decided is whether its RNs are statutory supervisors within the meaning of Section 2(11) of the Act, based on charge nurse responsibilities that they perform. The Employer's position is that the RNs are statutory

supervisors. In contrast, the Union's position is that they are employees who do not exercise true supervisory authority.

The Union also contends that the parties have had a collective-bargaining agreement that bars consideration of the Employer's unit clarification petition. The Union asserts that the Employer did not give proper notice that it wanted to change or terminate the parties' collective-bargaining agreement – which expired on February 20, 2008 - and that consequently the agreement automatically renewed for one year. The Employer asserts that it gave proper notice – as did the Union - and that the collective-bargaining agreement did not renew.

An additional issue that the parties did not identify is whether the petition should be dismissed because the Employer's contention that its hospital and nursing home RNs are statutory supervisors is inconsistent with a stipulation in the underlying representation proceeding that they are included in the bargaining unit and that they are not supervisors. Neither party has stated a position on that issue.

As I discuss below, I conclude that it is appropriate to dismiss the petition. Although there is no collective-bargaining agreement that would bar Board consideration of the Employer's supervisory status contentions, the Employer still does not have the right at this time to litigate the supervisory status issue. In the underlying representation proceeding, the Employer stipulated that RNs are included in the unit and that they are not supervisors. In such circumstances, the Board does not permit a party to avoid being held to its earlier stipulation. In any event, even though the earlier stipulation bars the Employer from litigating the supervisory status issue, I have

considered the full record and have concluded that the evidence does not show that those RNs are statutory supervisors.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to me. Upon the entire record in this proceeding, I find:

1. The hearing officer's rulings are free from prejudicial error and are hereby affirmed.

2. The Employer is a Montana nonprofit corporation with offices and a place of business in Forsyth, Montana, where it is engaged in the operation of an acute care hospital and nursing home. The Employer annually derives gross revenues in excess of $250,000 and annually purchases and receives at its Forsyth, Montana facility goods and materials valued in excess of $5,000 directly from points located outside Montana. The Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act and is subject to the Board's jurisdiction.

3. The Union is a labor organization within the meaning of Section 2(5) of the Act.

4. Based upon the record, and for the reasons set forth below, the Employer's unit clarification petition will be dismissed.

DECISION

I. THE PETITION IS NOT PROPERLY BEFORE THE BOARD AT THIS TIME

A. The Petition Is Inconsistent with the Stipulated Election Agreement in the Underlying Representation Proceeding

As set forth below, the evidence shows that, before the Employer filed the unit clarification petition claiming that the hospital and nursing home RNs are statutory

supervisors, it stipulated in the underlying representation proceeding that those RNs were included in the unit and that supervisors were excluded. Thus, the Employer's effort here to have the RNs excluded from the unit on the grounds that they are statutory supervisors is contrary to its earlier stipulation in the representation proceeding. In these circumstances, I conclude that the Employer's unit clarification is not proper.

1. Facts[1]

On March 16, 2005, the Union filed Case No. 27-RC-8380, in which it requested an election to determine if the Employer's RNs wished to be represented for purposes of collective bargaining. The Regional Director scheduled a hearing for March 29, 2005, and notified the parties of the hearing. On March 28, 2005, the Regional Director approved a stipulated election agreement between the parties, in which they agreed to waive the scheduled hearing. The election agreement defined the appropriate bargaining unit as the following:

> Included: All full-time and regular part-time registered nurses employed by the Employer at its hospital and nursing home located in Forsyth, Montana.
>
> Excluded: All other employees, guards and supervisors as defined in the Act.

On April 20, 2005, a tally of ballots issued, showing that the Union won the election by a vote of nine to four. On April 28, 2005, the Regional Director certified the Union as the collective-bargaining representative of the unit.

[1] In making the factual findings set forth in this paragraph, I take official notice of the record in Case No. 27-RC-8380.

Following certification, the parties agreed to a collective-bargaining agreement with a term from February 21, 2006, through February 20, 2008. In the agreement's recognition clause, the parties described the unit as follows:

> Included: All registered nurses employed at Rosebud Health Center in Forsyth, Montana.
>
> Excluded: Coordinators, supervisors and guards as defined in the National Labor Relations Act ("the Act"), and all employees other than registered nurses, provided that any registered nurse supervisor/coordinator can perform work normally performed by members of the bargaining unit.

After expiration of the collective-bargaining agreement's term, the Employer filed the unit clarification petition in this case.

2. Applicable Legal Principles

In Premier Living Center, 331 NLRB 123 (2000), the Board held that when a party stipulates in a representation proceeding to the unit inclusion of a classification, the party cannot litigate the alleged supervisory status of that classification in a subsequent unit clarification proceeding, absent newly discovered and previously unavailable evidence or changed or unusual circumstances. The rationale for that policy is "to discourage parties from entering into a stipulation in a representation proceeding and then attempting to avoid being held to that stipulation." Goddard Riverside Community Center, 351 NLRB No. 84, slip op. at 1, 2 (2007). The Board views its rule as "a corollary of [its] longstanding policy that once a ballot has been cast without challenge, its validity cannot thereafter be challenged, a policy which has met with Supreme Court approval." Premier Living Center, 331 NLRB at 123 n.4 (citing NLRB v. A.J. Tower, 329 U.S. 324 (1946)). In Premier Living Center, the Board specifically rejected the contention that it is required, in light of the Act's statutory

exclusion of supervisors, to determine the supervisory status of job classifications included in a bargaining unit any time the issue is raised. Id. at 123.

In Premier Living Center, the Board cited I.O.O.F. Home of Ohio, Inc., 322 NLRB 921 (1997), a case in which it held that, absent newly discovered and previously unavailable evidence or special circumstances, a respondent in a proceeding alleging a violation of Section 8(a)(5) is barred from relitigating issues that were or could have been litigated in a prior representation proceeding. In Premier Living Center, the Board observed that in I.O.O.F. Home it had overruled McAlester General Hospital, 233 NLRB 589 (1977), a case in which it had allowed an employer who had stipulated to the inclusion of certain employees in a certified unit to litigate their supervisory status in a subsequent unit clarification proceeding.

In Goddard, 351 NLRB No. 84, slip op. at 2 (2007), the Board recently reaffirmed the validity of the holding in Premier Living Center, although on the facts presented in that case the Board found that Premier Living Center did not apply. In Goddard, the Board limited Premier Living Center to situations in which a party has expressly stipulated to inclusion of the specific classification at issue in the subsequent proceeding. Id. at 2-3. In Goddard, the Board found that the parties had not specifically stipulated to unit inclusion of the disputed classification. Id. at 2.

The Board has concluded that its holding in Premier Living Center does not contradict Washington Post Co., 254 NLRB 168 (1981). In Washington Post, the Board allowed an employer to litigate a supervisory issue in a unit clarification proceeding even though the union had been certified after a representation proceeding and the disputed classification long had been included in the unit. The Board stated in

Washington Post that "when presented with an appropriate petition or claim, [it] is required to exclude positions from a bargaining unit where the inclusion of those positions would violate the principles of the Act." Id. at 168-169. However, the Board also made clear in Washington Post that there are exceptions to that general policy. Id. at 169. In Goddard, 351 NLRB No. 84, slip op. at 2, the Board recognized that Washington Post allowed for exceptions, and it described the holding of Premier Living Center as a "clear exception" to the general principle that it will process a timely unit clarification petition seeking to exclude a classification based on supervisory status. Thus, where a party stipulates in a representation proceeding that a classification is included in a unit, Washington Post does not require the Board to address the merits of an employer's subsequent contention that the classification is supervisory.

Moreover, the Board's decision in Washington Post to permit the employer to advance its supervisory status contention through the post-certification unit clarification petition rested in large measure on the unique events that occurred during the representation proceeding. In Washington Post, the Board observed that during the representation proceeding the employer never had indicated an intention to abandon its supervisory status contentions, and that it merely had agreed to the regional director's proposal that the employer allow an election at which it would not challenge the employee status of the alleged supervisors, subject to the filing of a post-certification unit clarification petition if necessary. Id. at 169-170. The Board found the following:

> [i]t is clear that, but for the Regional Director's proposals and the subsequent election, the earlier hearing in the RC proceeding would have continued and the [employer] would have been permitted to present its case on the unit placement issues. The instant UC petition is thus clearly an offshoot of the earlier RC hearing. . . . In light of the earlier representations made by the Regional Director, we are satisfied that the

> unit clarification process is now a proper vehicle for a resolution of the issues presented.

Consequently, Washington Post did not involve the issue presented here – that is, whether the Board should process a unit clarification petition that is contrary to a stipulated election agreement through which the employer expressly abandoned its right to litigate supervisory status.

Indeed, in I.O.O.F. Home, Premier Living Center, and Goddard, the Board explained that Washington Post involved unique circumstances under which the employer had not abandoned its right during the initial representation proceeding to have the Board address its claims of supervisory status. In each of those cases, the Board made clear that during the representation proceeding in Washington Post the regional director expressly had authorized the parties to raise the supervisory issue post-certification by filing a unit clarification petition in exchange for the parties' agreement not to litigate the unit placement issue prior to the election. See I.O.O.F. Home of Ohio, Inc., 322 NLRB at 922-923 n. 7; Premier Living Center, 331 NLRB at 123-123 n.5; Goddard, 351 NLRB No. 84, slip op. at 2-3 nn.5 and 8. In I.O.O.F. Home and Premier Living Center, the Board found the situations in those cases to be distinguishable from Washington Post because, during the representation proceedings, the involved respondents voluntarily abandoned their claims of supervisory status and stipulated to unit inclusion without any authorization from the regional directors to raise the supervisory issue following certification. Id. In Goddard, the Board concluded that Washington Post applied because the parties' stipulation during the underlying representation proceeding did not specifically cover the classification at issue in the unit clarification proceeding, and consequently there was no showing that by entering into

the stipulation the employer had voluntarily abandoned any claim that the classification was supervisory. See Goddard, 351 NLRB No. 84, slip op. at 2-3.

3. Analysis

Based on Premier Living Center, it is appropriate to dismiss the Employer's petition. The hospital and nursing home RN classification that the Employer now seeks to exclude through this unit clarification proceeding is the identical classification that is expressly covered by the stipulated election agreement. Additionally, there is no evidence that, when the Employer entered into the stipulated election agreement including those RNs, it did anything other than voluntarily abandon any claim that the RNs are statutory supervisors. Moreover, the Employer has not proffered, much less introduced, any evidence showing the existence of any changed or unusual circumstances that would justify allowing it to depart from its earlier stipulation in which it waived its right to litigate supervisory status. Thus, the record does not include any evidence comparing and contrasting the RNs' duties and responsibilities following the March 2005 stipulation with their duties and responsibilities as of the time of the stipulation.

To be sure, the passage of time between the stipulation and subsequent unit clarification petition in this case is greater than it was in Premier Living Center. Thus, the Employer filed its petition approximately three years and two months after approval of the stipulated election agreement. In Premier Living Center, it appears that the employer filed its unit clarification petition approximately seven months after it agreed to inclusion of the disputed classification through the stipulated election agreement.[2] For

[2] The Board did not state the date of the stipulation, but it is clear that the election was held on May 8, 1998. Presumably, the regional director approved the stipulation shortly

the reasons discussed below, however, it does not follow that the greater passage of time here dictates against application of Premier Living Center.

First, the Board has not stated that it will cease to apply Premier Living Center once the underlying stipulation reaches a certain age. In fact, the Board has suggested that it will not accept the length of time involved as a reason for allowing a party to escape, post certification, from a stipulation in a representation proceeding. In I.O.O.F. Home, 322 NLRB at 922 n.6, the Board stated that "[t]iming is not a factor in applying the well-established rule of prohibiting the relitigation of issues in an 8(a)(5) proceeding that were or could have been litigated in the prior representation proceeding."

Additionally, the passage of three years and two months is dramatically less than the passage of time involved in Goddard. In Goddard, the unit clarification petition followed the stipulation by 14 years. Even there, however, the Board did not rely on that great passage of time to conclude that Premier Living Center did not apply. Rather, in Goddard the Board held that Premier Living Center did not apply because the stipulation did not specifically cover the disputed classification.

Furthermore, the stipulation involved here is not so old as to make it impractical for the Employer to present evidence of changed or unusual circumstances since entry into the stipulation in March 2005, if such circumstances in fact exist. Indeed, several of the witnesses who testified have been with the Employer for many years. Hospital Charge Nurse Thelma Beyl, Nursing Home Charge Nurse Gayle Fulton, Hospital Charge Nurse Lori Van Donsel, and Hospital Charge Nurse Melinda Hubbard have

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before that election date. The employer filed its unit clarification petition on November 12, 1998.

worked at the facility, respectively, for 42 years, 34 years, 18 years, and 7 years.[3] Presumably, they would have knowledge of any changed circumstances in the few years since March 2005. Given that there were witnesses who could have shed light on whether there have been changed circumstances, the Employer's failure to establish the existence of such circumstances weighs strongly in favor of holding it to its stipulation that the RNs are statutory employees.

4. Conclusion

Based on the foregoing, the Employer's unit clarification petition will be dismissed.

B. There Is No Merit to the Union's Contention that an Existing Collective-Bargaining Agreement Bars Consideration of the Petition

As explained above, the Union contends that the Employer's petition cannot proceed because their collective-bargaining agreement renewed for another year due to the Employer's failure to give adequate notice that it wanted to change or terminate the agreement.[4] Contrary to the Union, I conclude that there has not been an existing collective-bargaining agreement that would bar consideration of the petition. The only applicable bar is due to the stipulated election agreement, as described above.

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[3] The Employer itself called Fulton and Hubbard as witnesses.

[4] In its post-hearing brief, the Union did not argue that there is an existing collective-bargaining agreement based on any Employer failure to give notice to forestall automatic renewal. Thus, the Union may have abandoned its contention that a current contract bars the Board from considering the Employer's petition for unit clarification.

1. Facts

The parties' collective-bargaining agreement includes the following provision relating to renewal of the agreement:

> This Agreement, except as otherwise provided, shall become effective February 21, 2006, and shall continue in effect through February 20, 2008, and will continue from year to year thereafter unless either party notifies the other in writing not more than one hundred twenty (120) days or less than ninety (90) days prior to the expiration date of any year thereafter, of the desire to amend, terminate or change this Agreement.

The notice period applicable to contract expiration on February 20, 2008, began on October 24, 2007, and ended on November 23, 2007.

On or about November 11, 2007, the Employer's CEO, James Ferguson, delivered a letter to Union President Lori Van Donsel.[5] He stated that he had been in touch with the Montana Department of Labor for information about decertifying the Union, but that agency had not yet provided him with information. His letter also stated that the RNs exercised various types of "managerial authority," and that the bargaining unit was not appropriate because the charge nurses "represent management."

On or about November 13, 2007, the Union's Executive Director, Robert Allen, responded to CEO Ferguson's letter. Allen acknowledged that Union President Van Donsel had received Ferguson's letter on November 11. In his letter, Allen stated that the Union "ha[d] been clear in our intention to hold bargaining talks in anticipation of a successor agreement to be effective February 20, 2008." The letter also stated that "[t]he members of [Montana Nurses Association] and the nurses we represent wish to continue to talks and negotiations and continue to offer our availability for bargaining

[5] The record includes only page 1 of this letter, but it appears that the letter continued onto a page 2.

meetings." Executive Director Allen offered to meet every other Wednesday through year end.

2. Applicable Principles

In order to avoid disrupting a bargaining relationship entered into by the parties when they executed a collective-bargaining agreement, the Board's policy generally is to refuse to clarify an existing bargaining unit during the term of an existing contract. See Edison Sault Elec. Co., 313 NLRB 753, 753 (1994). The Board's rule is based on the rationale that to entertain a petition for unit clarification during the midterm of a contract which defines the bargaining unit would disrupt the parties' collective-bargaining relationship. Id. In other words, the Board has held that to permit clarification during the course of a contract would mean that one of the parties would be able to effect a change in the composition of the bargaining unit during the contract term after it agreed to the unit's definition. Id.

3. Analysis

I conclude that the parties' collective-bargaining agreement did not automatically renew and that, therefore, the parties did not have a current agreement when the Employer initiated this unit clarification proceeding.

First, the Employer gave adequate notice to forestall automatic renewal of the collective-bargaining agreement. Before expiration of the contractual notice period on November 23, 2007, the Employer delivered a letter to Union President Van Donsel, contending that the bargaining unit was not appropriate because the unit RNs exercise

managerial authority. That letter reasonably put the Union on notice that the Employer wanted to terminate the agreement.[6]

Second, the Union itself gave notice during the contractually specified period that it wanted to bargain over terms of a successor agreement. Under the terms of the renewal clause, automatic renewal is forestalled if either party gives the other party written notice that it wants to change or terminate the agreement.

4. Conclusion

For the reasons stated above, I conclude that there has not been an existing collective-bargaining agreement that would bar the Board from considering the Employer's unit clarification petition.

II. THE EVIDENCE DOES NOT DEMONSTRATE THAT THE RN CHARGE NURSES ARE STATUTORY SUPERVISORS

In contending that the charge nurses are statutory supervisors, the Employer relies on several aspects of their authority in providing health care services for the Employer's hospital patients and nursing home residents. Below, I set forth the evidence concerning that authority and discuss whether it confers supervisory status. I conclude that the charge nurses' exercise of that authority does not make them statutory supervisors.

[6] At the hearing, the Union argued that CEO Ferguson's letter to President Van Donsel was inadequate because it was delivered by e-mail. Even if that were the case, it would not matter, as the contractual renewal clause does not prohibit giving written notice by e-mail. Moreover, the record does not establish that Ferguson sent his letter by e-mail.

A. Facts

1. Background

The Employer's hospital and nursing home operate 24 hours per day, 7 days per week. The hospital has 25 critical access beds, 14 of which are swing beds that are shared with the nursing home. At the time of the hearing, there were approximately 35 residents in the nursing home. There are approximately 99 employees in the hospital and nursing home.

As part of its hospital operations, the Employer utilizes RNs and Certified Nursing Assistants (CNAs). The hospital CNAs are responsible for direct personal care needs, such as washing patients, taking their vital signs, turning them, and taking them for walks. The Employer has four full-time and four per diem RNs working in the hospital, along with five full-time and two per diem CNAs. Per diem employees work on an as-needed basis.[7]

In its nursing home, the Employer utilizes RNs, Licensed Practical Nurses (LPNs), CNAs, and Resident Care Assistants (RCAs). The nursing home CNAs are responsible for getting the residents out of bed, washing and bathing them, brushing their teeth, combing their hair, dressing them, helping them to the bathroom, and helping them with feeding. The RCAs' duties consist primarily of giving out snacks and water to residents. There are four RNs working in the nursing home, including per diem RNs. The Employer also uses "traveling" RNs in the nursing home, who work through various employment agencies.[8]

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[7] The per diem RNs are included in the bargaining unit.

[8] The traveling RNs are not included in the unit.

The Employer's current Chief Executive Officer is James Ferguson. There is an administrative staff, which typically works Monday through Friday approximately from 8:00 a.m. to 5:00 p.m.

The hospital and nursing home each has its own Director of Nursing. The Directors of Nursing for the hospital and nursing home, respectively, are Mindy Price and Elizabeth Burnette.[9] Price and Burnette report to CEO Ferguson. The parties stipulated, and I find, that the Directors of Nursing are supervisors within the meaning of Section 2(11) of the Act.

DON Price has overall responsibility for the hospital. Price works Monday through Friday, from 7:00 a.m. to 4:00 or 5:00 p.m., and is on call when she is not present at the hospital. Price is responsible for scheduling work hours for the hospital staff. The hospital has two 12-hour nursing shifts per day, basically from 6:00 a.m. to 6:00 p.m. and 6:00 p.m. to 6:00 a.m. Price's general practice is to schedule one RN and one CNA per shift. Each RN usually works three 12-hour shifts per week.

DON Burnette has overall management responsibility for the nursing home. Her hours usually are 7:00 a.m. to 5:00 p.m. on Monday through Thursday, and she goes to the nursing home on scheduled days off. DON Burnette establishes the nursing home work schedule, with help from the ward secretary. The customary staffing pattern is two nurses during the day shift and one nurse on the night shift. The nurses' day shift runs from 5:45 a.m. to 6:15 p.m., and their night shift is from 6:00 p.m. to 6:00 a.m. There are three CNA shifts: 5:00 a.m. to 1:30 p.m., 1:00 p.m. to 9:30 p.m., and 9:00 p.m. to

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[9] Burnette is filling the nursing home DON position on an interim basis, while the regular nursing home DON is on maternity leave.

5:30 a.m. During the nurses' day shift, there usually are four CNAs. On the nurses' night shift, there usually are two CNAs.

The Employer places considerable patient care responsibility on its RNs. The Employer designates its full-time and per diem RNs as "charge nurses."[10] When CEO Ferguson and the DONs are not present at the facility, the RN charge nurses are the highest ranking personnel. The RN charge nurses are responsible for ensuring adequate patient care throughout their shifts and overseeing the care process. They also are responsible for handling issues of building maintenance and security. As part of their patient care responsibilities, the charge nurses possess various types of personnel authority, as set forth more fully below.

2. Authority of Nursing Home Day Shift Charge Nurses to Designate Work Teams

The nursing home day shift utilizes two care teams, designated as Team 1 and Team 2.[11] Each team is responsible for the care of patients in the rooms assigned to the particular team. Team 1 is responsible for room numbers 1 through 14, and Team 2 is responsible for room numbers 20 through 29 and 31 through 37. Each team usually has one RN, two CNAs, and one bath aide. The two teams share an RCA. For each shift, a charge nurse designates CNAs and bath aides to one of the two teams. The charge nurse does not assign particular staff members to specific residents. The evidence does not show that the work differs significantly from team to team.

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[10] In the nursing home, the Employer also uses its LPNs as charge nurses. The supervisory status of LPNs is not directly at issue here, because the Union's bargaining unit consists only of RNs.

[11] The hospital and the nursing home night shift do not have teams, apparently because of the smaller number of staff as compared to the nursing home day shift.

Gayle Fulton, an RN charge nurse for the nursing home day shift, testified that one of the two charge nurses on duty usually divides available staff equally between the two teams, based on staff preferences. Fulton testified that the nurses are not able to follow preferences if it would result in two inexperienced CNAs being placed on the same team. She also testified that she occasionally takes into account how well particular CNAs and residents get along. According to Fulton, the nursing home charge nurse also designates who answers call lights during meal periods. The record does not disclose what factors the charge nurses take into account in designating who answers those calls.

Nursing Home DON Burnette testified that, in dividing CNAs between Team 1 and Team 2, the charge nurses consider the level of care that the residents require and the experience of the particular CNAs. Additionally, she testified that the charge nurses interchange CNAs between the two teams so that the CNAs get experience with more residents. Like Charge Nurse Fulton, DON Burnette also testified that the charge nurses designate who answers call lights.

3. Authority to Call In Staff

The hospital charge nurses have the authority to call in nurses or CNAs if needed. Hospital DON Price testified that the hospital charge nurses' decision to call someone is based on whether there has been an increase in patient census and/or patient acuity that warrants having additional personnel. Price testified that the charge nurses can choose who to call in, and that they do not have to call in according to a certain order. Hospital Charge Nurse Melinda Hubbard testified that she calls in whoever is available and that she does not make selections based on skill levels.

Similarly, Hospital Charge Nurse Victoria Lane testified that she calls in whoever she is able to contact. Hospital Charge Nurse Lori Van Donsel testified that when there are not enough people to do the work she calls whoever lives closest to the facility. The testimony does not establish whether or not the hospital charge nurses have the authority to require that someone come in.

With regard to the nursing home, Nursing Home DON Burnette testified that, in the event an employee does not show up for a shift, the charge nurse can extend the hours of someone already on site, ask someone else to come in early, or call a temporary nursing agency. The Employer has authorized nursing home charge nurses to have other staff fill in even if it means that the employee will incur overtime. Nursing Home Charge Nurse Gayle Fulton testified that, if someone does not show up for a shift, she "call[s] everybody" and "pray[s] they'll answer the phone and come to work." She testified that she starts calling the people who have the day off and that she tries to call people who will not incur overtime. Her testimony establishes that, when she calls someone to come in early, she asks whether that person can come in. Fulton also testified that, to cover the staff shortage, she may ask a person to stay over at the end of a scheduled shift, even if it means that the employee incurs overtime.

4. Authority to Call Off Staff

In the hospital, charge nurses can "call off" personnel if there are too many workers for the available work. Calling off involves calling a CNA and telling her not to come to work, or it may involve having a CNA go home for lack of work. According to witness testimony, the Employer has a written guideline for application of the hospital calling-off procedure. The Employer did not introduce the written guideline into

evidence. The witness testimony reflects that, under the guideline, the charge nurse is expected to call off the scheduled CNA if there are two or less patients. Additionally, the guideline states that if there are two patients and the charge nurse feels that the patients' acuity warrants having a CNA, then the charge nurse can keep the CNA. The record does not include any detailed evidence pertaining to actual situations in which hospital charge nurses called off CNAs for lack of work.

In the nursing home, the charge nurses also have the authority to send home LPNs or CNAs if the patient census is low and staff members are not busy. The need to send staff home for lack of work happens less frequently in the nursing home than in the hospital, presumably because the number of nursing home residents is more stable than the number of patients in the hospital. As with the hospital, the record includes little detailed evidence of actual situations in which nursing home charge nurses sent CNAs home for lack of work. The hearing officer asked DON Burnette for specific examples, but Burnette did not offer any such examples. Instead, she answered by stating the following:

> We have some employees that work eight hours a day and then some that work 12 and sometimes they overlap those shifts. And instead of having four CNAs, we may have five, and if we're not busy, [the charge nurses] can certainly say to that CNA that's working 12 hours, "Yes, you may go home early," or, "No, you may not go home early." They can -- you know, if they ask --.

Nursing Home Charge Nurse Gayle Fulton testified about a single incident in which she let a CNA leave early when work was slow. According to Fulton, a CNA asked to leave early on a day when work was slow and Fulton told her that she could leave because there were enough other people on shift to handle the work.

5. Authority to Approve Shift Switches

In the hospital and the nursing home, the Employer allows employees to take a day off even after the DON has made out the work schedule, but any scheduled employee who wants to take a day off is expected to work out a schedule switch with another employee. The employees have to notify the charge nurse and have the nurse approve the change and note the schedule change. According to Hospital Charge Nurse Melinda Hubbard, the employees take care of working it out between themselves and the charge nurses "initial it off." Nursing Home Charge Nurse Gayle Fulton similarly testified that she has had CNAs work out shift switches between themselves and then tell her about it, and she changes the shifts on the schedule.

6. Authority Over Breaks

Hospital Charge Nurse Melinda Hubbard testified that she has asked employees to wait a few minutes to take a break because the hospital was busy. Nursing Home Charge Nurse Gayle Fulton testified that, years ago, she told an employee that she could not take a break after just having had a 20-minute long personal telephone conversation. Fulton considered the time spent on the personal call to have been break time.

7. Authority to Direct and Correct Work

The hospital charge nurses are involved in directing and correcting the work of CNAs. The hospital CNAs are trained to cover the entire hospital, and they generally know what is expected of them. Occasionally, the charge nurses give the CNAs specific tasks to perform. For example, the hospital charge nurses may tell CNAs to perform tasks such as washing patients, taking their vital signs, turning them, and taking

them for walks. The charge nurses also check on the CNAs' work to make sure that they are providing proper care, and they may tell them to get to work if they are sitting around. Hospital DON Price testified that the charge nurses are not disciplined if the CNAs do not do their jobs. According to DON Price, if a charge nurse cannot get a CNA to do her job through talking to her about it, then DON Price speaks directly with the CNA.

Similarly, the nursing home charge nurses have responsibility for directing and correcting the work of CNAs, bath aides, and RCAs. The charge nurses make sure that those employees help get the residents out of bed, wash and bathe patients, brush their teeth, comb their hair, dress them, help them to the bathroom, and help them with feeding. They also can direct housekeeping and dietary staff to make sure that patients' rooms are clean, that food service is proper, and that staff are not mistreating patients. The charge nurses are not disciplined if other staff members do not perform their jobs, although DON Burnette may talk to the charge nurses about the CNAs not doing their jobs. Burnette testified that the charge nurses could be held accountable in their job reviews for not giving adequate oversight to the CNAs, but the Employer did not offer any evidence to show that it actually has imposed any such accountability. For example, the record does not include any actual job reviews.

8. Authority to Discipline

Hospital DON Price and Nursing Home DON Burnette characterized some of their charge nurses' authority as being "discipline." DON Price's testimony makes clear that the alleged "discipline" to which she referred is the charge nurses' verbally correcting CNAs by telling them that certain conduct is not appropriate. DON Burnette's

testimony shows that her reference to "disciplinary" authority is to charge nurses' authority to counsel, teach, and help improve skills.

Hospital charge nurses have "written up" CNAs in the sense that they have memorialized in writing that CNAs were not giving adequate patient care. For example, Hospital Charge Nurse Melissa Hubbard testified about a time when she felt that a CNA was being insubordinate. Hubbard told the CNA that she was being insubordinate and followed up by submitting a written statement to the DON about the situation, without giving the write-up to the CNA. Hubbard testified that when she submits a write-up to the DON it is the DON's decision as to whether or not to take the issue further. Hubbard testified that she has made a written statement to the DON only once or twice a year over the last seven years. Hospital Charge Nurse Lori Van Donsel testified about a time when she had concerns about an employee so she wrote a report to DON Price and Price investigated the situation. DON Price testified that she puts write-ups in the CNAs' personnel files, although she also testified that there has only been one time when she included a write-up in a file. The record does not include any actual examples of any write-ups by the hospital charge nurses.

The nursing home charge nurses also have done write-ups of CNAs. DON Burnette testified that when she receives a write-up from a charge nurse, she talks to the charge nurse about it, then talks separately to the person written up, and frequently brings the charge nurse and the employee together to discuss the problem. Nursing Home Charge Nurse Gayle Fulton testified that she has issued write-ups to CNAs and passed them to the DON, but she did not remember why because it happened so long ago. Fulton also testified about a form that she had used, but the record does not

include the blank form itself or any completed forms. It is not clear whether the form that Fulton mentioned still is in use, as she testified that she used it long ago. No other witness testified about any particular form for writing up employees.

The parties' collective-bargaining agreement includes a provision calling for progressive discipline, with the following steps: (1) oral reprimand, (2) written reprimand, (3) suspension, and (4) discharge. The evidence does not substantiate that the parties have treated any charge nurse verbal counselings or write-ups as oral or written reprimands for purposes of the progressive discipline policy. Additionally, the evidence does not show that any charge nurse write-ups actually have laid the foundation for future discipline or that they have led to further discipline.

In the event of serious employee misconduct when the DON is not available, the hospital and nursing home charge nurses can send the employee home until the DON can deal with problem and decide about discipline that may be imposed. DON Price and DON Burnette testified that they did not think that there have been any actual situations in which charge nurses have sent anyone home for misconduct. In giving examples of when it would be appropriate for a charge nurse to send someone home, DON Price mentioned situations involving alleged CNA patient abuse, intoxication, or refusal to work. DON Burnette testified that the nursing home charge nurses can send employees home for such things as patient abuse, being under the influence of alcohol or drugs, negligence in the performance of job duties, or inappropriate dress. Hospital Charge Nurse Melissa Hubbard testified that she sent a CNA home for being intoxicated. She testified that it would be a danger to patients to have an intoxicated

person working, and that she would expect anyone to send a drunk employee home. Hubbard notified the DON and higher management took care of the problem.

9. Authority to Recommend Hire

RN charge nurses are able to give input into hiring decisions. Hospital DON Price has had charge nurses sit in with her on interviews and then make recommendations as to whom she should hire. Nursing Home DON Burnette testified that she personally handles applicant interviews and does not have charge nurses participate in the interview process, but she does allow the charge nurses to give their opinions. For example, Burnette recently solicited charge nurses' opinions about an applicant who had mixed references. Burnette hired the applicant after the charge nurses recommended that the nursing home give her a chance.

10. Authority to Recommend Discharge

RNs can recommend discharge. For example, several hospital charge nurses complained to Hospital DON Price about a CNA who called in sick on multiple occasions and who lacked skills. DON Price took the nurses' views into consideration, along with her own opinion, and discharged the CNA. DON Price testified that the decision whether to discharge rests with her and the administrator. Hospital Charge Nurse Melissa Hubbard testified that she recommended the discharge of an employee for physically assaulting a patient, in accord with a Montana legal requirement that nurses take action to prevent patient abuse. Hubbard submitted that recommendation to the DON, and the person was discharged. Nursing Home DON Burnette is the only witness who testified about the nursing home charge nurses' role in discharges. Burnette generally testified about one recent situation in which she discharged a new

hire who still was in her probationary period. Burnette testified that some charge nurses recommended that the new hire be discharged, and Burnette accepted that recommendation.

11. Authority to Resolve Employee Conflicts

Occasionally, the charge nurses become involved in helping work out arguments or disputes between other employees. Hospital Charge Nurse Melinda Hubbard testified about one situation involving a dispute between two CNAs. Hubbard sat down with them and helped facilitate communication so that they could resolve the situation "basically on their own." Nursing Home Charge Nurse Gayle Fulton testified that when the CNAs have had disputes the charge nurses have talked to them individually and then together. The record does not include additional evidence concerning any charge nurses' role in helping to work out employee disputes.

B. Applicable Principles

Section 2(3) of the Act excludes "any individual employed as a supervisor" from the Act's definition of "employee," thereby excluding supervisors from the Act's protections. Section 2(11) of the Act defines a "supervisor" as:

> any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

Section 2(11) is to be read in the disjunctive, and the possession of any one of the Section 2(11) powers will make one a supervisor. See KGW-TV, 329 NLRB 378, 381 (1999). The requirement of use of independent judgment, however, is conjunctive; thus, an individual is not a supervisor unless the individual exercises an authority with

the use of independent judgment and holds the authority in the interest of the employer. Id.

The requirement that independent judgment be exercised imposes a significant qualification that limits the definition of "supervisor" to include only people whose exercise of any of the 12 stated Section 2(11) authorities is not merely routine. In adding the independent judgment requirement in the definition of "supervisor," Congress sought to distinguish between truly supervisory personnel, who are vested with "'genuine management prerogatives,'" and employees - such as "'straw bosses, leadmen, set-up men, and other minor supervisory employees'" - who enjoy the Act's protections even though they perform "'minor supervisory duties.'" NLRB v. Bell Aerospace Co., 416 U.S. 267, 280-281 (1974) (quoting S. Rep. No. 105, 80th Cong., 1st Sess. 4 (1947)).

In Oakwood Healthcare, Inc., 348 NLRB 686 (2006), the Board construed the Section 2(11) term "assign" to refer to "the act of designating an employee to a place (such as a location, department, or wing), appointing an individual to a time (such as a shift or overtime period), or giving significant overall duties, i.e., tasks to an employee." Id. at 689. "[T]o 'assign' for purposes of Section 2(11) refers to the . . . designation of significant overall duties to an employee, not to the . . . ad hoc instruction that the employee perform a discrete task." Id. The Board observed that some job assignments are more difficult and demanding than others, and that the power to assign an employee's overall duties is important to the employee and management. Id.

With regard to the health care context, the Board concluded that "the term 'assign' encompasses . . . charge nurses' responsibility to assign nurses and aides to

particular patients." Id. As the Board stated, "the assignment of a nurse's aide to patients with illnesses requiring more care rather than to patients with less demanding needs will make all the difference in the work day of that employee . . . [and i]t may also have a bearing on the employee's opportunity to be considered for future promotions or rewards." Id.

In Oakwood, the Board also discussed the Section 2(11) term "responsibly to direct." The Board held that, for direction to be "responsible," "the person directing and performing oversight of [an] employee must be accountable for the performance of the task by the other, such that some adverse consequence may befall the one providing the oversight if the tasks performed by the employee are not performed properly." Id. at 691-692. "Thus, to establish accountability for purposes of responsible direction, it must be shown that the employer delegated to the putative supervisor the authority to direct the work and the authority to take corrective action, if necessary. It also must be shown that there is a prospect of adverse consequences for the putative supervisor if he/she does not take these steps." Id. Such adverse consequences must materially affect the putative supervisor's terms and conditions of employment, either positively or negatively, as a result of her performance in directing others. See Golden Crest Healthcare Center, 348 NLRB 727, 730-731 (2006).

In Oakwood, 348 NLRB at 692, the Board also adopted an interpretation of "independent judgment" that focuses on the degree of discretion involved in making a decision, not on the kind of discretion involved (e.g. professional or technical). For an individual's judgment to be "independent" within the meaning of Section 2(11), the individual must form an opinion or evaluation by discerning and comparing data. Id. at

692-693. As the Board explained, "actions form a spectrum between the extremes of completely free actions and completely controlled ones, and the degree of independence necessary to constitute a judgment as 'independent' under the Act lies somewhere in between these extremes." Id. at 693. The Board recognized that at one end of the spectrum there are situations where there are detailed instructions for the actor to follow, but that at the other end there are situations where the actor is wholly free from constraints. Id. It found that "a judgment is not independent if it is dictated or controlled by detailed instructions, whether set forth in company policies or rules, the verbal instructions of a higher authority, or in the provisions of a collective-bargaining agreement[,]" but that a judgment is independent even where there is a guiding policy so long as that policy allows for discretionary choices. Id. Similarly, "if [a] hospital has a policy that details how a charge nurse should respond in an emergency, but the charge nurse has the discretion to determine when an emergency exists or the authority to deviate from that policy based on the charge nurse's assessment of the particular circumstances, those deviations, if material, would involve the exercise of independent judgment." Id. at 693-694.

Additionally, the judgment that the putative supervisor exercises must "rise above the merely routine or clerical" for it to be truly supervisory within the meaning of Section 2(11). Id. at 693. "If there is only one obvious and self-evident choice (for example, assigning the one available nurse fluent in American Sign Language (ASL) to a patient dependent upon ASL for communicating), or if the assignment is made solely on the basis of equalizing workloads, then the assignment is routine or clerical in nature and

does not implicate independent judgment, even if it is made free of the control of others and involves forming an opinion or evaluation by discerning and comparing data." Id.

In applying its independent judgment test, the Board elucidated its meaning with respect to charge nurses' authority to assign available staff to particular patients. The Board made clear its view that:

> [i]n the health care context, choosing among the available staff frequently requires a meaningful exercise of discretion. Matching a nurse with a patient may have life and death consequences. Nurses are professionals, not widgets, and may possess different levels of training and specialized skills. Similarly, patients are not identical and may require highly particularized care. A charge nurse's analysis of an available nurse's skill set and level of proficiency at performing certain tasks, and her application of that analysis in matching that nurse to the condition and needs of a particular patient, involves a degree of discretion markedly different than the assignment decisions exercised by most leadmen.

Id. at 695. The Board also stated that "where [a] charge nurse makes an assignment based upon the skill, experience, and temperament of other nursing personnel and on the acuity of the patients, that charge nurse has exercised the requisite discretion to make the assignment a supervisory function 'requir[ing] the use of independent judgment[,]'" and that "if [a] registered nurse weighs the individualized condition and needs of a patient against the skills or special training of available nursing personnel, the nurse's assignment involves the exercise of independent judgment." Id. at 693, 698.

Consistent with the congressional intent to distinguish between truly supervisory personnel and those who merely perform minor supervisory duties, the Board is careful not to construe supervisory status too broadly, for a worker who is deemed to be a supervisor loses his organizational rights. See KGW-TV, 329 NLRB 378, 381 (1999). The burden of proving supervisory status is on the party asserting it. See NLRB v. Kentucky River Community Care, 532 U.S. 706 (2001). Conclusory evidence is not

sufficient to establish supervisory status. See Golden Crest Healthcare Center, 348 NLRB 727, 731 (2006); Loyalhanna Care Center, 352 NLRB No. 105, slip op. at 2 (2008).

C. Analysis

1. Authority of Nursing Home Day Shift Charge Nurses to Designate Work Teams

The Employer contends that the nursing home day shift charge nurses are supervisors based on their involvement in designating work teams. For the reasons set forth below, I do not conclude that such authority is supervisory.

The evidence establishes, and I find, that the nursing home day shift charge nurses' involvement in designating work teams constitutes Section 2(11) assignment. Their authority to designate aides to one of two teams - each of which is responsible for the care of residents in designated blocks of rooms – determines employees' places of work for each shift. Such team placement amounts to assigning as defined in Oakwood. It remains, then, to determine whether the nursing home day shift charge nurses' assignment of aides to teams involves the exercise of independent judgment.

Nursing Home Charge Nurse Fulton and Nursing Home DON Burnette are the only witnesses who testified about team assignments for the day shift, and their testimony differs significantly. According to Fulton's testimony, she usually bases her decision about team placement on the aides' expressed team preferences. She deviates from that standard practice only when following preferences would result in two inexperienced aides being placed together on the same team, or when a resident and a CNA are not getting along. DON Burnette testified very generally that in dividing CNAs between Team 1 and Team 2 the charge nurses consider the level of care that the

residents require and the experience of the particular CNAs, and that the charge nurses interchange CNAs between the two teams so that the CNAs get experience with more residents. Both them testified that, for each shift, the charge nurses designate the CNA who will be responsible for answering call lights.

I conclude that Charge Nurse Fulton's testimony is not sufficient to establish that the charge nurses for the nursing home day shift use independent judgment in assigning staff to the two teams. Fulton's testimony establishes that the charge nurses usually split the available staff between the two teams, based on staff preferences for a particular team. The Board has held that assigning to equalize workloads is routine and clerical in nature and does not implicate independent judgment. See Oakwood, 348 NLRB at 697. Moreover, acceding to staff preferences as to assignment to Team 1 or Team 2 does not strike me as involving enough judgment to make a charge nurse a statutory supervisor, especially given that the evidence does not establish significant workload differences between the two teams. Similarly, the decision that two new, inexperienced aides – or that individuals who are not getting along - should not be placed together on the same team seems obvious enough that such a decision cannot be deemed supervisory. Additionally, the evidence does not establish that designating who will answer call lights is anything other than routine.

With regard to DON Burnette's testimony that the charge nurses consider the experience levels of particular CNAs and the level of care that the residents require, that testimony does not persuade me that the nursing home day shift charge nurses exercise independent judgment in assigning to the teams. For the reasons set forth below, I find that Burnette's testimony is not sufficient.

First, Burnette's testimony lacks the specificity that is necessary to establish that the nursing home day shift RNs use independent judgment in matching staff with residents. As discussed above, the burden of proving supervisory status is on the party asserting it, and conclusory evidence is not sufficient. Burnette's testimony does not provide any actual examples when charge nurses assigned CNAs to residents based on a balancing and matching of CNAs' skills and residents' particular needs. Indeed, considering that the charge nurses only designate who will serve the residents in a geographically grouped set of rooms, it is not obvious that there could be such a careful individualized balancing and matching of skills and needs. In light of the conclusory nature of Burnette's testimony, I find that her testimony is not sufficient to establish the existence of independent judgment. See, e.g., Loyalhanna Care Center, 352 NLRB No. 105, slip op. at 2 (2008) (testimony by director of nursing that nurses reassign staff according to resident acuity level was "merely conclusory and hence insufficient to establish independent judgment"); Lynwood Manor, 350 NLRB No. 44, slip op. at 1-2 (2007) (conclusory testimony by LPN about assignment of CNAs based on "patient acuity" insufficient to show independent judgment); Avante at Wilson, Inc., 348 NLRB 1056, 1057 (2006) (supervisory status not shown where testimony lacked specificity).

Additionally, I attach more weight to Charge Nurse Fulton's testimony that I do to DON Burnette's testimony. Fulton actually functions as a charge nurse while Burnette does not. Moreover, Burnette had been the Nursing Home DON for only a few months before she testified. Accordingly, Fulton presumably has more knowledge than Burnette does about the actual factors involved in designating who shall be on which

team. As discussed above, Fulton's testimony does not reflect that the charge nurses go through a process of individualized matching of staff and residents.

As for DON Burnette's testimony that the charge nurses interchange CNAs between the two teams to give the CNAs experience with more residents, I conclude that the exercise of authority to interchange does not establish independent judgment. Such interchange appears to be of a merely routine nature.

2. Authority to Call In Staff

While the record shows that the charge nurses exercise judgment in deciding to call in staff when needed, the evidence does not demonstrate that their authority includes the right to require that someone go to work outside scheduled work hours. "It is well established . . . that the party seeking to establish supervisory authority must show that the putative supervisor has the ability to require that a certain action be taken; supervisory authority is not established where the putative supervisor has the authority merely to request that a certain action be taken." Golden Crest Healthcare Center, 348 NLRB 727, 729 (2006). The testimony regarding the hospital charge nurses is inconclusive as to whether they can require attendance on an unscheduled basis. As for the nursing home charge nurses, the testimony of DON Burnette and Charge Nurse Fulton indicates that the charge nurses' authority is limited to asking employees to come in. In the absence of evidence showing that the hospital and nursing home charge nurses can compel someone to come in, I conclude that their call-in authority does not make them statutory supervisors.

3. Authority to Call Off Staff

I conclude that the above-described evidence concerning the charge nurses' authority to call off employees is not sufficient to demonstrate that the charge nurses are supervisors.

With respect to the hospital, the evidence shows that the Employer has a written guideline establishing a general rule that charge nurses are expected to call off scheduled CNAs if there are two or less patients. That guideline places a significant constraint on the degree of discretion that the charge nurses have to decide staffing levels. While the guideline affords the charge nurses discretion about whether to call off scheduled CNAs in the event that there are two patients, the evidence does not show any detail regarding the extent to which the charge nurses actually have exercised discretion in such situations. In the absence of more detailed evidence, the Employer has not met its burden of proof. Its general reliance on guideline flexibility in the event that there are two patients amounts to relying on mere "paper authority," which is not an adequate basis for establishing supervisory authority. See, e.g., Golden Crest Healthcare Center, 348 NLRB at 731; Loyalhanna Care Center, 352 NLRB No. 105, slip op. at 3, 8 (2008).

Nor is the evidence regarding calling off in the nursing home sufficient to show supervisory status. The record includes little detailed evidence relating to specific situations in which nursing home charge nurses let CNAs out due to lack of work. While the hearing officer sought to elicit such testimony from DON Burnette, Burnette testified only to a generalized scenario in which a CNA asked for permission to leave due to lack of work and in which the decision to grant permission seems to have been a fairly

obvious choice. Similarly, the single incident about which Charge Nurse Fulton testified seems not to have involved the exercise of much discretion on Fulton's part, given that the CNA asked to leave early.

4. Authority to Approve Shift Switches

The Employer contends that the charge nurses' role in approving employee shift switches is supervisory. The evidence, however, shows that the charge nurses merely sign off on changes that the employees work out between themselves. The Board has held that such authority is routine and clerical, and does not involve supervisory independent judgment. See, e.g., Golden Crest Healthcare Center, 348 NLRB at 730 n.10 (authority to "okay" or "initial" time changes not supervisory). Additionally, there is no evidence that the charge nurses ever decline to approve schedule changes that the employees have worked out. In the absence of evidence showing that charge nurses approve some switches and deny others, there is no basis for concluding that the nurses exercise enough judgment for that approval process to be anything other than routine.

5. Authority Over Breaks

Another factor on which the Employer relies in contending that the charge nurses are supervisors is their purported authority over breaks. The evidence shows only that Hospital Charge Nurse Melinda Hubbard has asked employees to wait a few minutes to take a break because they were busy, and that Nursing Home Charge Nurse Gayle Fulton told an employee that her 20-minute long phone conversation constituted her break. Such testimony does not establish that the charge nurses exercise sufficient authority to make them supervisors. See, e.g., Youville Health Care Center, 326 NLRB

495, 495-496 (1998) (authority to approve breaks is a routine, clerical judgment); Washington Nursing Home, 321 NLRB 366, 366 n.4 (1996) (same).

6. Authority to Direct and Correct Work

I conclude that, although the charge nurses are involved in directing employees' work, their direction is not supervisory because it is not "responsible" as that Board construed that term in Oakwood. The witness testimony does not reflect that the charge nurses are prone to suffer some adverse consequence if CNAs or other staff do not perform their jobs. Nor is there any documentary evidence demonstrating that there is a prospect for such adverse consequences.

While Nursing Home DON Burnette testified that charge nurses' job reviews could reflect that they were not providing adequate supervision to CNAs, the record does not include any actual evidence that CNA performance affects charge nurse evaluations, either positively or negatively. Such testimony amounts to mere speculation that is not sufficient to establish accountability. See, e.g., Golden Crest Healthcare Center, 348 NLRB at 731.

Additionally, the record includes testimony to the effect that the RNs' licenses make them accountable for the actions of anyone working under their direction. Such generic accountability, however, is not sufficient to establish that direction is responsible in the sense intended in Oakwood. See, e.g., Lynwood Manor, 350 NLRB No. 44, slip op. at 2-3 (2007) (testimony from LPN that "anything [the aides] do wrong falls back on my shoulders" inadequate to establish accountability).

7. Authority to Discipline

The Employer contends that the charge nurses are supervisors because of their role in disciplining employees, by counseling and warning them about job misconduct, writing them up, and sending them home pending investigation. I conclude that the Employer's contention lacks merit, for the reasons discussed below.

The evidence shows that the hospital and nursing home charge nurses have the authority to tell employees that certain conduct is not acceptable and to counsel them to help improve their skills. Such verbal counseling authority is not supervisory disciplinary authority under Section 2(11). See, e.g., Ken-Crest Services, 335 NLRB 777, 777-778 (2001) (authority to issue general counselings and verbal warnings not supervisory discipline).

While the evidence shows that the charge nurses have the authority to write up CNAs regarding inadequate patient care and to give those write-ups to the appropriate DON, the evidence is not sufficient to show that those write-ups constitute anything more than reports to the DONs so that the DONs can decide whether further action is warranted. The authority to report to higher management is not supervisory. See Heritage Hall, E.P.I. Corp., 333 NLRB 458, 460 (2001).

The fact that the parties' collective-bargaining agreement obligates the Employer to follow progressive discipline does not establish that the charge nurses' authority to issue write-ups is supervisory. As stated above, the evidence does not show that the parties have considered any charge nurse write-ups to be part of progressive discipline. Moreover, without actual evidence that such write-ups constitute progressive discipline, it would be incongruous to conclude that the mere inclusion of the progressive discipline

policy in the labor contract provides a basis for excluding the RNs as supervisors. The RNs' inclusion in the unit and the progressive discipline clause have existed together since inception of the agreement.

Nor are the charge nurses statutory supervisors on the grounds that they have the authority to send employees home pending investigation by higher management. The charge nurses evidently have not had occasion to exercise any such authority, but the testimony establishes that they can send employees home in the event of serious misconduct such as patient abuse, being under the influence of alcohol or drugs, or refusal to work. Where the authority to send employees home is limited to instances of egregious misconduct, the Board does not consider the authority to establish statutory supervisory status. See Alstyle Apparel, 351 NLRB No. 92, slip op. at 12 (2007); Bredero Shaw, 345 NLRB 782, 783 (2005); Vencor Hospital-Los Angeles, 328 NLRB 1136, 1138 (1999). Moreover, the charge nurses' authority in such situations is only to send employees home pending investigation; they do not have broader discretionary authority to undertake any other action. Compare Metropolitan Transportation Services, 351 NLRB No. 43, slip op. at 4-5 (2007) (statutory supervisor status established where putative supervisor had authority to discipline by choosing among differing levels of discipline, including sending employees home and other possibilities).

8. Authority to Recommend Hire

The Employer contends that the hospital and nursing home charge nurses are supervisors based on hiring recommendations that they make to their DON. For the reasons discussed below, I conclude that such recommendations are not supervisory.

Recommendations regarding personnel action can be supervisory only if they are "effective" within the meaning of Section 2(11). The Act does not define the phrase "effectively to recommend." Under the Board's construction of that phrase, authority effectively to recommend generally means that the recommended action is taken without independent investigation by superiors, not simply that the recommendations ultimately are followed. See Bellaire Medical Center, 348 NLRB 940, 954 (2006); Children's Farm Home, 324 NLRB 61, 61 (1997).

Here, the evidence does not establish that charge nurses' input in the hiring process is accepted without independent investigation by higher authorities. The evidence shows that DONs Price and Burnette are the officials who run the hiring process, and they merely allow their charge nurses differing degrees of advisory participation in that process. DON Price personally conducts applicant interviews and she allows her charge nurses to sit in on the interviews and make recommendations to her. DON Burnette handles the interviews herself without having charge nurses sit in on them, although she asks charge nurses for their opinions about hiring and she has followed their recommendations. That evidence is not adequate to show that the charge nurses' hiring recommendations are effective. The DONs are actively involved in making their own judgments throughout the selection process, and it cannot fairly be said from the evidence that the charge nurses are the real decision-makers regarding hiring.

9. Authority to Recommend Discharge

The Employer also contends that the hospital and nursing home charge nurses are supervisors based on recommendations that they make to their DON regarding

discharging employees. I conclude that the charge nurses' recommendations regarding discharges are no more supervisory than are their recommendations regarding hires.

The testimony regarding the hospital charge nurses' discharge recommendations shows that DON Price and the administrator make the final decision, and that Price merely takes the nurses' views into consideration along with her own opinion. Thus, the hospital charge nurses' role in discharging are not effective within the meaning of Section 2(11).

The record also does not establish that the nursing home charge nurses' role in recommending discharge establishes them as supervisors. The evidence regarding the nursing home charge nurses' role in discharging is limited to one discharge only. That evidence tends to show only the sporadic exercise of allegedly supervisory authority, and the Board does not consider the sporadic exercise of supervisory power to confer supervisory status. See Oakwood, 348 NLRB at 693 (citing Bowne of Houston, 280 NLRB 1222, 1223 (1986)). Accord Croft Metals, Inc., 348 NLRB 717, 722 n.14 (2006). Also, although DON Burnette testified to some extent about that single discharge, the record does not reveal the full circumstances surrounding it. In light of the general and conclusory nature of the evidence, it is not a sufficient basis for declaring the nursing home charge nurses to be supervisors.

10. Authority to Resolve Employee Conflicts

The Employer submits that the charge nurse are involved in supervisory grievance adjustment because they are involved in assisting employees in working out their disputes. I conclude that the charge nurses' involvement in working out conflicts is not supervisory grievance adjustment. The record reflects only that the charge nurses

help facilitate communication so that the employees can work out their differences. The Board has held that alleged supervisors' authority to rely on their personal relationships with employees to informally resolve complaints is insufficient to establish supervisory status. See Ohio Masonic Home, 295 NLRB 390, 392-394 (1989); Illinois Veterans Home at Anna L.P., 323 NLRB 890, 891 (1997).

11. Other Authority

The Employer also introduced testimony that the charge nurses are "in charge" and that they possess various other types of authority such as dealing with building maintenance and safety and security issues. None of those responsibilities confers supervisory status. The Board has held that being "in charge" of a facility and being the highest ranking worker on site falls within the category of secondary indicia of supervisory authority. See Golden Crest Healthcare Center, 348 NLRB at 730 n.10 (2006); Loyalhanna Care Center, 352 NLRB No. 105, slip op. at 3 (2008). It also has held that where putative supervisors are not shown to possess any of the primary indicia of supervisory status set forth in Section 2(11), secondary indicia are insufficient to establish supervisory status. Id.

D. Conclusion

For the reasons stated above, I conclude the Employer's RNs are not statutory supervisors based on any of their charge nurse responsibilities. Accordingly, the unit will not be clarified to exclude the RNs.

ORDER

IT IS HEREBY ORDERED that the Employer's unit clarification petition is dismissed.

RIGHT TO REQUEST REVIEW

Under the provision of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision and Direction of Election may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, NW, Washington, DC 20570. This request must be received by the Board in Washington, DC by **September 17, 2008**.

Dated at Denver, Colorado this 3rd day of September, 2008.

Michael W. Josserand, Regional Director
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